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No. 87-267

In The

Supreme Court of the United States

October Term, 1987

D. H. HOLMES COMPANY, LTD.,

Appellant,

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee.

**ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA**

BRIEF OF APPELLEE

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State of Louisiana*

February 8th, 1988

QUESTION PRESENTED

Can a State impose a non-discriminatory Compensating Use Tax on a domestic Company which has catalogs printed out-of-state and controls their delivery by mail to its in-state customers, free of charge, where the State law provides a) that ownership by the Company of the catalogs is not dependent upon possession, and b) that ownership by the Company continues until the catalogs are accepted by the Company-designated donee.

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BRIEF OF APPELLEE

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STATUTES INVOLVED

The following constitutional, statutory and regulatory provisions involved have been printed in the Appendix.

United States Constitution

Art. 1, Section 8, clause 3

Amendment 14, Section 1, clause 3

Louisiana Revised Statutes

R.S. 47:301 A Definitions

R.S. 47:302 A Imposition of tax

R.S. 47:303 A Collection

R.S. 47:321 A Imposition of (additional sales) tax

Louisiana Civil Code

L.C.C. Art. 481 Ownership and possession distinguished

L.C.C. Art. 1467 Methods of acquiring or disposing gratuitously

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39 C.F.R. § 912 Procedures to Adjudicate Claims for Personal Injury or Property Damage Arising Out of the Operation of the U.S. Postal Service

§ 912.5 Administrative claim; when presented

§ 912.6 Administrative claim; who may file

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STATEMENT OF THE CASE

Statement of the Facts

D. H. Holmes Company, Ltd. ("Holmes") is a Louisiana corporation, founded in 1842. Its principal office is located at 819 Canal Street, New Orleans, Louisiana. (Joint Appendix 67) (hereinafter "J.A. —") Holmes owns and operates department stores at 13 locations in Louisiana (J.A. 68), a majority of which are in New Orleans. (Plaintiff's Exhibit 5, reproduced at J.A. 35-37). (Admitted in evidence, Transcript Record pages 149-150) (hereinafter "Admitted, T.R. —"). Others are in the Louisiana cities of Baton Rouge, Hammond, Houma, Lafayette and in Jefferson Parish. (J.A. 68-69) Holmes has 5,000 employees, 500,000 charge customers, and a million to a million and a half other customers. (J.A. 69)

The State of Louisiana provides substantial services for the benefit of Holmes, its employees and its customers. In Orleans Parish alone, for instance, Louisiana funds public education with direct appropriations to the Orleans Parish School Board in addition to minimum foundation funds of close to $100,000,000 a year; Louisiana pays $4,-800,000 a year for police supplementary pay; Louisiana funds mass transit at close to $5,000,000 a year; Louisiana supports the Audubon Park Zoo with $500,000 a year; Louisiana also allocates money for the judicial systems, firemen, sheriffs' deputies, both civil and criminal, coroners, assessors, district attorneys, and sewerage systems. Other than the zoo, assessors and this large amount for mass transit, all of the other parishes receive comparable funding based upon population, including, of course, those parishes where other Holmes' stores are located. (J.A.

43-45, 50-51. Plaintiff's Exhibit 1, reproduced at J.A. 20-34. Admitted T.R. 52.)

Holmes has thrice judicially acknowledged these broad based services. "As we pointed out earlier, this matter is really without dispute. There is no doubt that the State of Louisiana provides numeral (sic) services including fire, police protection, sanitation, and all types of services." (Mr. Rinker. J.A. 42) "[T]here is no dispute that services are provided through money provided by the State." (Mr. Rinker. J.A. 51) "Holmes does not dispute that it has a substantial connection with Louisiana, as found by the Court of Appeal." (Appellant's brief page 26)

For the purpose of securing business, Holmes had merchandise catalogs printed for distribution to its customers in Louisiana. (J.A. 71) In addition to this directly secured business, Holmes indirectly secured business with these catalogs by keeping Holmes' name before the public and thereby encouraging people to shop at Holmes. (J.A. 72-73) The catalogs also provide a mail-in slip insert to facilitate mail orders out of the catalogs. (J.A. 71) Holmes pays for these catalogs as well as the bulk rate postage thereon. (J.A. 75, 81, 86-87)

The Louisiana people to whom these catalogs were targeted were determined by Holmes' Sales Promotion Manager, and the catalogs mailed shortly prior to Holmes' promotional sale dates. (J.A. 72-73, 84, 86) Even though Holmes purchased and owned these catalogs (J.A. 87-91), an intended recipient would not know of their existence or that he might receive a catalog from Holmes. (J.A. 89) He could not buy a catalog even if he knew of their exist-

ence, for Holmes has a policy prohibiting the sale of their catalogs. (J.A. 83)

The return address used on Holmes' catalogs is Holmes' New Orleans, Louisiana, Canal Street address, and it was to this address that some of these catalogs were returned. (J.A. 73) (Plaintiff's Exhibit 6, reproduced in part, J.A. 38, 39. Admitted, T.R. 193-194) Holmes' catalogs contained the instruction "postal carrier, if the resident (addressee) has moved, please leave this with the current resident". (J.A. 75) (Plaintiff's Exhibit 6, J.A. 39) Even though Holmes targeted specific people to receive Holmes catalogs, Holmes admitted that these people may not in fact have received the catalogs. (J.A. 76) Indeed, Holmes did not know whether the intended recipients still lived at the addresses to which the catalogs were mailed by Holmes. (J.A. 89)

Holmes' catalogs are designed in New York City and then printed for Holmes at one of three locations, Atlanta, Boston or Oklahoma City. (J.A. 80) None of these catalogs were printed in Louisiana. (J.A. 80) They could have been printed in Louisiana; however, Holmes sought to evade Louisiana sales tax by printing the catalogs elsewhere. (J.A. 97) During the taxable period Holmes published nineteen catalogs, four in 1979, six in 1980 and nine in 1981. (J.A. 80) Eighty-two percent of these catalogs were sent by Holmes to targeted Louisiana residents who were selected by Holmes' Sales Promotion Manager. (J.A. 71, 81) These intended recipients were all of the Holmes' charge customers. (J.A. 89) No taxes were paid to New York on these catalogs, nor to Atlanta, Boston or Oklahoma City. (J.A. 69, 85, 86) Unlike Louisiana, these jur-

isdictions do not levy a sales tax on the publishing or printing of catalogs. (J.A. 54, 86)

Having learned from a routine audit that the cost of these catalogs by taxable year was: 1979=$520,000; 1980=$670,000; and 1981=$834,000 (J.A. 85), and that no sales tax had been paid on the catalogs, the Department of Revenue and Taxation for the State of Louisiana proposed to assess Holmes for a compensating "use tax" pursuant to Louisiana Revised Statute 47:301, *et seq.* (J.A. 67) Holmes refused to pay the tax, and this suit was brought for its recovery. (J.A. 2-10) The parties stipulated at trial that the use tax on the catalogs would be $43,937.03 together with statutory interest and attorney fees on the aggregate thereof.[1]

Judgments and Opinions Below

Shirley McNamara, Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana ("Louisiana") brought this action in the Civil District Court for the Parish of Orleans, located in New Orleans, Louisiana, against D. H. Holmes Company, Ltd., a Louisiana corporation, for the collection of use taxes relating to catalogs which were purchased by, and both designed and printed for, Holmes. These catalogs were printed in states that levied neither an applicable sales nor a use tax. Holmes then caused these catalogs to be mailed from the printing situs to Louisiana addressees who were targeted and selected by Holmes to receive these catalogs.

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[1] This action initially involved a candy sales tax issue, which was resolved at the trial level.

In opposing this suit, Holmes asserted a Commerce Clause constitutional challenge to the imposition of a compensating use tax on these catalogs.

In its Reasons for Judgment the trial court held that (1) Holmes had sufficient possession of the catalogs to warrant the imposition of the tax, (2) the distribution of the catalogs was intended for the use of Holmes in increasing its sales to potential customers who were residents of Louisiana, and (3) once the catalogs reached the residences of the prospective customers to whom they were addressed, Louisiana taxing authority reaches the resting place of the catalogs. In dismissing the constitutional challenge, the court cited cases from this Court and Louisiana appellate courts. The court found that the Use Tax Statute met the four-prong test enunciated by the Court. The trial court's judgment and reasons therefor are reproduced in the Appendix to the Jurisdictional Statement at pages 12A-22A. They are unreported.

Holmes appealed to the Louisiana Fourth Circuit Court of Appeal. The appellate court agreed that the facts of this case met the four-prong Commerce Clause test, citing cases decided by this Court and Louisiana appellate courts. It also expressly found that Holmes purchased these catalogs out of state and paid for their mailing in order to further Holmes' sales and that the catalogs at the time of taxation were not a part of Interstate Commerce, for they had come to rest in Louisiana. Further, by causing the catalogs to be distributed in Louisiana, Holmes was liable for the Use Tax applicable to the value of the catalogs determined by their cost. The opinion of the state appellate court is reproduced in the Appendix

to the Jurisdictional Statement at pages 2A-10A. It is reported as *McNamara v. D. H. Holmes Company, Ltd.*, 505 So.2d 102 (La. App. 4 Cir. 1987).

After the Louisiana Supreme Court denied writs of certiorari, Holmes appealed to this Court where probable jurisdiction was noted on November 2, 1987. — U.S. —, 108 S.Ct. 283, 98 L Ed 2d 244 (1987).

Recent Amendment to Louisiana Law

Although cognizant that the Question Presented in Holmes' brief eliminates a claim concerning Holmes' constitutional challenge to R.S. 47:305(E) as had been asserted in the Question Presented in Holmes' Jurisdictional Statement, Louisiana deems it appropriate to advise the Court of a recent amendment to R.S. 47:305(E), *see Fusari v. Steinberg*, 419 U.S. 379, 387 n. 12 (1975).

By Acts No. 156 of 1987, effective September 1, 1987, R.S. 47:305(E) was amended and reenacted so as to include the following language:

> . . . [H]owever, nothing herein shall prevent the collection of the taxes due on sales of tangible personal property into this state which are promoted through the use of catalogs and other means of sales promotion and for which federal legislation or federal jurisprudence enables the enforcement of this Chapter upon the conduct of such business.

As amended and reenacted, said Section now reads:

> E. It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce; however, nothing herein shall prevent the collection of the taxes due on sales of tangible personal property into this state which are promoted through the use of catalogs and other means of sales promotion and for which federal legislation or federal jurisprudence enables the enforcement of this Chapter upon the conduct of such business. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

R.S. 47:305(E). This amendment was in anticipation of action by the Court or Congress concerning the Court's decision in *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967). Congress has before it five bills relating to the issues decided by the Court in *National Bellas Hess*. In the House they are Nos. HR 1642, HR 1891, and HR 3521. In the Senate the bills are Nos. S 639 and S 1099.

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SUMMARY OF THE ARGUMENT

The first part of the argument reviews the underlying reasons why the courts below found as a matter of law and fact that Holmes owned the catalogs and that the operating incidence of the use tax was the distribution by Holmes of their catalogs.

The trial court found that Holmes had purchased these catalogs and that Holmes owed them. (J.A. 88-89) Holmes attempted to show that it did not physically possess the catalogs, except for 1,000 received at the store.

In Louisiana, however, a person may be the owner of tangible personal property without possessing the property. L.C.C. Art. 481. This ownership, if transferred by gift, remains the property of the donor until it is accepted by the donee. L.C.C. Arts. 1467, 1468, 1540 and 1543. Thus, ownership of the catalog by Holmes continued until Holmes' gifts of the catalogs were accepted by their unsuspecting addressees.

As owner of the catalogs under Louisiana law Holmes is a dealer who imports or causes to be imported tangible personal property for distribution. R.S. 47:301(4). As a result of its distribution of these catalogs, Holmes is liable for the use tax. R.S. 47:301(19) as imposed by R.S. 47:302 A(2) and R.S. 47:321 A(2). As the appellate court below held, "after the catalogs were in Louisiana mail boxes they were not part of interstate commerce and became part of the property mass in this state. Distribution of the catalogs certainly constitutes 'use' by Holmes under the statute and is subject to the tax." *McNamara v. D.H. Holmes Company, Ltd.*, 505 So.2d 102, 105 (La. App. 4 Cir. 1987). This Court has held that state law determines the operating incidence of a tax. *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 107-08 (1975), *quoting Memphis Steam Laundry v. Stone*, 342 U.S. 389, 392 (1952).

The second part of the argument shows that this tax is valid under the Commerce Clause. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court enunciated a four-prong test for determining whether a state tax violates the Commerce Clause, holding that "[W]e note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax,

or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." *Id.* at 287. In this case Louisiana has shown that the use tax as levied on Holmes' catalogs meets each of the four prongs of the test enunciated in *Complete Auto*:

(1) Nexus—Holmes owns 13 store locations throughout Louisiana, with 5,000 employees, 500,000 charge customers and 1,000,000 to 1,500,000 other customers. (J.A. 68-69) Holmes' annual sales for the taxable years were: 1979—$159,745,000.00; 1980—$176,548,000.00; and 1981—$197,320,000.00. (J.A. 98) Its income, for the same years before taxes, was: 1979—$6,350,000.00; 1980—$9,061,000.00; and 1981—$8,206,000.00. (J.A. 98)

Holmes distributes its catalogs to each of its 500,000 charge customers, 82% (or 410,000) of which are in Louisiana. (J.A. 89, 80) During the taxable period the number of catalogs distributed was: 1979—four; 1980—six; and 1981—nine. (J.A. 80) Thus, with 410,000 charge customers being given nineteen catalogs in these three years, the total distribution by Holmes would be 7,790,000 catalogs within Louisiana.

(2) Discrimination—There is no discrimination as to interstate commerce, for the sales tax payable on the purchase of tangible personal property is equal to the use tax applicable to the same tangible personal property. R.S. 47:302, 321.

(3) Apportionment—The tax is fairly apportioned for no sales tax was paid where the catalogs were designed and printed. (J.A. 69, 85, 86) Had such a sales tax been paid, Louisiana would have granted a credit against the

use tax for the sales tax paid elsewhere. R.S. 47:301 A (2), 303 A and 321 A (2).

(4) Services—The services provided by Louisiana in relation to the tax were not at issue, for Holmes has admitted the substantiality of the services. (J.A. 42, 51, Holmes' brief page 26.) Substantiality of the services is also reflected in the testimony as reproduced at J.A. 41-52. Plaintiff's Exhibit No. 1 reproduced at J.A. 20-34, Admitted, T.R. 52.

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ARGUMENT

The Louisiana State Court Determination As To The Taxation Incidence Should Be Upheld

Louisiana imposes a use tax on tangible personal property wnich a dealer, such as Holmes, imports or causes to be imported into Louisiana for use, consumption, distribution and storage for use or consumption within Louisiana, provided there is no duplication of the tax (whether in Louisiana or elsewhere). R.S. 47:301, (4) and (19), 302 A (2), 303 A and 321 A (2). It is a compensating tax in that the use tax rate is exactly the same as that for sales tax. R.S. 47:302 A (1) and (2), 321 A (1) and (2).

Just last term, the Court discussed the interrelationship between a sales tax and a compensating use tax in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. —, 97 L Ed 2d 199, 107 S.Ct. 2810 (1987):

> We upheld the tax because, in the context of the overall tax structure, the burden it placed on goods purchased out-of-state was identical to that placed on an equivalent purchase within the State. This identical impact was no fortuity; it was guaranteed by the statutory exemption from the use tax for goods on which a sales tax had already been paid,[13] regardless of whether the sales tax had been paid to Washington or to another State.[14] As we explained in Halliburton Oil Well Cementing Co. v. Reily, 373 US 64, 70 (1963):
>
> > "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state."

13. Many States provide tax credits that alleviate or eliminate the potential multiple taxation that results when two or more sovereignties have jurisdiction to tax parts of the same chain of commercial events. For example, the District of Columbia and all but three States with sales and use taxes provide a credit against their own use taxes for sales taxes paid to another State, although reciprocity may be required. See CCH State Tax Guide 6013-6014 (1986); Williams v. Vermont, 472 US 14, 22 (1985). See also Halliburton Oil Well Cementing Co. v. Reily, 373 US 64 (1963).

14. In his opinion for the Court in Henneford v. Silas Mason Co., Justice Cardozo carefully described the relationship between the 2% "tax on retail sales" imposed by Title III of Washington's 1935 tax code and the "compensating tax" imposed by Title IV on the privilege of use. The compensating use tax was imposed on the use of an article of tangible personal property which had been purchased at retail but had not been subjected to a sales tax that was equal to or in excess of that imposed by the State of Washington. If the rate of the tax imposed by another jurisdiction was less than 2%, the rate of compensating tax was measured by the difference. Explaining why

such a compensating tax does not discriminate against interstate commerce, Justice Cardozo wrote:

"Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. *It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there.* No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." 300 US, at 583-584 (emphasis added).

Id, at 97 L Ed 2d 199, 212-13.

A similar comparison has recently been made in an article by Professors Nowak and Rotunda:

> Use taxes on tangible personal property have two justifications. First, a use tax compensates the state for providing state law protection for the property's use in the state. Thus regarded, a use tax is a type of one-time property tax. In essence, the state imposes an initial fee for state protection of the person's ownership and use of the property. * * *
>
> The second justification for a use tax is that it compensates the state for the losses of sales tax revenue occasioned by in-state persons traveling to other states to make purchases of products that they will then use in the use tax state. The compensating use tax is an adjunct to the sales tax. The use tax rate will be the same as the sales tax rate. A person will not have to pay both a sales tax and a use tax on the same item to the same state if the use tax is only a compensating use tax. The use tax compensates the state for the loss of the sales tax.

Nowak & Rotunda, "Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and The Useless Multiple Tax Concept," 20 *U. C. Davis Law Review* 273, 278 (1987).

Louisiana learned through a routine audit that Holmes had caused catalogs to be designed and printed out-of-state and then imported in Louisiana for distribution to Holmes' customers. Because Holmes had not paid a sales tax to these out-of-state jurisdictions, Louisiana advised Holmes that Holmes should have reported and paid a use tax to Louisiana. Holmes refused payment, and this action was instituted.

There was no dispute as to most of the basic facts, i.e., the purchase by Holmes of the catalogs without the payment of sales tax; the importation by Holmes of the catalogs for distribution by Holmes to Holmes' designated customers; and the applicable tax, interest and attorney fees if judgment was ultimately entered against Holmes.

Holmes' position was that, except for 1,000 sent direct to the store, these catalogs were never under Holmes' possession or control in Louisiana and that the Commerce Clause grants Holmes immunity from taxation on these catalogs while they are in interstate commerce.

Louisiana's position was that Holmes owned these catalogs from the time of their purchase, through the time of Holmes' transfer of the ownership of the catalogs by gift to Holmes' designated recipient, and that under Louisiana law the gift was not completed until the ownership of the catalags was agreed upon and accepted by the designated recipient. L.C.C. Art. 1540. Holmes thus owned these catalogs:

> during the New York design process;
>
> during the Atlanta, Boston or Oklahoma printing process;
>
> during the mailing process;
>
> at the time they came to rest in Louisiana by placement into the unsuspecting recipient's mail or post office box; and
>
> until the designated recipient accepted the catalog.

Despite Louisiana's civil codal provision, L.C.C. Art. 481, that the ownership and the possession of a thing are distinct, Holmes attempted to equate ownership with possession. (J.A. 87, 88) The courts below concluded otherwise.

As to ownership, possession and control, three witnesses testified during the trial, Mr. Roy C. Bradley, the Director of Sales Tax, Department of Revenue and Taxation, State of Louisiana, whose testimony appears at J.A. 54-66, Mr. Paul R. Falter, Vice President/Treasurer Controller for Holmes, whose testimony appears at J.A. 67-79, and Mr. Stewart Gahn, the Sales Promotion Director for Holmes, whose testimony appears at J.A. 79-93.

Mr. Bradley was called under cross-examination by Holmes. Holmes elicited the following testimony:

Use taxes were levied on Holmes as "a dealer who imports or causes to be imported tangible personal property into the State [of Louisiana] for use and distribution in the State" (J.A. 56), *citing* R.S. 47:302;

Holmes has the right or power to direct the catalogs' distribution (J.A. 56);

The incidence of ownership by Holmes was that Holmes caused the catalogs to be imported into the state for Holmes' use, for the furtherance of its business and thereafter delivered to its customers and that the use made by Holmes was to promote the sale of its articles (J.A. 57);

Holmes purchases catalogs and causes them to be imported into Louisiana (J.A. 57);

The catalogs come to rest in Louisiana when they are placed in a mail box and the catalogs, while in the mail, are not in the physical possession of Holmes (J.A. 59);

Holmes controls the delivery of the catalogs in that Holmes determines to whom the catalogs would be delivered (J.A. 60);

Holmes could contact the Postal Service in event of error and prevent distribution (J.A. 61); *see* Domestic Mail Manual 152.7, made a part of the Postal Regulations by 39 C.F.R. 111.1;

Holmes continues to own each catalog until the addressee picks it up and accepts it, because Holmes purchased the catalogs and directed their delivery (J.A. 61);

The catalogs are taxed at their cost to Holmes (J.A. 64); and

That a customer does not own a catalog until he accepts it (J.A. 64); *see* L.C.C. Art. 1540 which provides that donations are effective from the date of acceptance, and L.C.C. Art. 1543 which provides that the acceptance must be made by the donee personally or by his attorney in fact.

Both Bradley and the Treasurer of D.H. Holmes, Paul R. Falter, testified that if undelivered, the catalogs are returned to Holmes (J.A. 57, 73). *See* return address on Plaintiff's Exhibit 6 (J.A. 39).

Paul R. Falter, the Treasurer of D. H. Holmes, and Stewart Gahn, Sales Promotional Director of Holmes, also testified during the trial. Mr. Falter testified that the catalogs are "[p]rinted for a purpose of attempting to secure business," and that they do in fact secure business for Holmes. (J.A. 71) Catalogs also help to keep Holmes' name in front of the public. (J.A. 72) Mr. Falter testified that Mr. Gahn determines how a shipment of catalogs will be made as well as the method by which catalogs leave the printer and arrive at their designated address (J.A. 74), and that Holmes determines the addressees for the catalogs. (J.A. 74) Mr. Gahn testified that the catalogs are addressed to Holmes' active charge account customers. (J.A. 86) Mr. Gahn also testified that the catalog states, "Postal carrier, if no one, if the recipient has moved, please leave this with the current resident." (J.A. 75) (Plaintiff's Exhibit 6 J.A. 39) Mr. Gahn admitted that Holmes does not even know if a catalog's addressee still lives at that address when the catalogs are shipped. (J.A. 89)

Both Holmes officials also testified about the method of payment by Holmes for the catalogs. Mr. Falter testified that Holmes pays a portion of the printing charge beforehand, and the rest afterwards. (J.A. 74) Mr. Gahn testified that Holmes pays for the postage on the catalogs directly to the Postal Service under its annual bulk rate. (J.A. 86)

When asked whether Holmes owned the catalog, Mr. Gahn kept stating that Holmes was not in physical possession of the catalog, except for the 1,000 sent directly to the store. (J.A. 87, 88) Finally the court intervened:

> Q. So I understand what happens to them, I'm interested in Holmes' belief as to the ownership of them.
>
> MR. GRACE: Your Honor, again, that calls for a legal conclusion and I think that to some extent Mr. Pugh is arguing with the witness. The question has been asked and answered two times.
>
> MR. PUGH: I think we've spent about a half hour this morning talking about this very same thing with the Revenue Department as to who owned them, your Honor.
>
> THE COURT: Well you know, I think this witness is just flirting around an answer. I think deep down inside he knows that Holmes purchased something for some money and that Holmes doesn't just give away its money.
>
> THE WITNESS: Oh, no.
>
> THE COURT: They purchased these, I assume they did pay. They bought them?
>
> THE WITNESS: Yes.
>
> THE COURT: They bought them from a printer or from a company a certain product?

THE WITNESS. Yes.

THE COURT: Yes. And when you buy something you own it, so, you know, I didn't think that that is causing us too much of a problem. As a matter of fact, I would suspect that counsel would stipulate that at some point Holmes owned these catalogs, but let's move on because no need to—

(J.A. 88-89)

The court also asked Mr. Gahn questions as to what Holmes could do in the event of damage to the catalogs or upon discovery of errors printed in the catalogs. (J.A. 91-93) Mr. Gahn was unable to answer either of these questions. The Postal Regulations make clear that Holmes as the owner of the catalogs has a right under 39 C.F.R. 281 and 39 C.F.R. 912 to collect damages from the postal service, and further has a right under 39 C.F.R. 111.1 in conjunction with Domestic Mail Manual 152.7 to recall the catalogs for any reason, including errors printed therein, merely by filing Form 1509, provided free by the postal service.

Holmes has altered its Question Presented, as between Holmes' Jurisdictional Statement and Holmes' Brief (a) by eliminating a claim that La. Rev. Statute 47:305(E), as applied, is violative of the Commerce Clause; and (b) by eliminating its claim that Appellant was without any proprietary interest in the catalogs while located in the State of Louisiana:

JURISDICTIONAL STATEMENT
QUESTION PRESENTED

Holmes submitted the following QUESTION PRESENTED in its Jurisdictional Statement Page i:

> Whether provisions of the Louisiana use tax law, La. Rev. Stat. Sections 47:302(A)(2), 47:305(E) and 47:321(A) are violative of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States, as applied to assess against appellant a tax on merchandise catalogs sent by United States Mail directly from out-of-state printers to the mailboxes of Louisiana recipients, without appellant ever having any proprietary interest in the catalogs while located in the State of Louisiana.

BRIEF
QUESTION PRESENTED

Holmes submitted the following QUESTION PRESENTED in its Brief Page (i):

> Whether provisions of the Louisiana use tax law, La. Rev. Stat. 47:302(A)(2) and 47:321(A), are violative of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States, as assessing directly against appellant an impermissible tax on merchandise catalogs sent in interstate commerce via the United States Mail directly from out-of-state printers to the mailboxes of Louisiana recipients, free of charge to the recipients, where appellant lacked possession or control over the catalogs in Louisiana, both while the catalogs were in interstate commerce, including the time they were in the recipients' mailboxes, and after they came to rest in the hands of the Louisiana recipients.

Thus, Holmes has abandoned those arguments:

> A question set forth in a petition or jurisdictional statement will be considered abandoned if not reiterated and argued in the brief on the merits once review has been granted. See Travelers Health Assn. v. Virginia, 339 U.S. 643, 651 n.4 (1950); Russell v. United States, 369 U.S. 749, 754 n.7 (1962).

R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 553 (6th ed. 1986).

Holmes does not attempt to argue that it did not own the catalogs pursuant to Louisiana law. Instead, Holmes argues on page 29 of its brief that "United States law . . . confirms that Holmes can have no real ownership . . . " of the catalogs in Louisiana. No federal law of ownership is ever cited for this astounding proposition. Ownership in Louisiana for Louisiana tax purposes is a question of Louisiana law. Indeed, Holmes in effect admits that state law controls ownership by citing a Wisconsin decision holding that under Wisconsin law catalogs remained the property of the printer until delivered to the recipient. *Wisconsin Department of Revenue v. J. C. Penney Co., Inc.*, 323 N.W.2d 168, 170 (1982).

As to ownership of the catalogs, Holmes in brief never discusses the Louisiana law relative to ownership and its transfer by gift, L.C.C. Arts. 481, 1467, 1468, 1540 and 1543. Nor does Holmes attempt to discuss the decisions of the Court to support the right of a state to levy a tax on less than all of the attributes of ownership. "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership." *Henneford v. Silas Mason Company*, 300 U.S. 577, 582 (1937). "A legislature has a wide range of choice in classifying and limiting the subjects of taxation. (citations omitted) The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all." (Citation omitted) *Id.* at 587-88. "The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements." *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249, 268 (1933).

In assessing the law of Louisiana as to the facts presented, the courts below concluded that the incidence of the tax was on the distribution of the catalogs. In suggesting that this finding as to both fact and law by the Court of Appeal, Fourth Circuit, State of Louisiana, should be accepted by the Court, Louisiana relies on the decisions of the Court that "the State may determine for itself the operating incidence of its tax. But, it is for this Court to determine whether the tax, as construed by the highest court of the state is or is not 'a tax on interstate commerce.' " *Colonial Pipeline v. Traigle*, 421 U.S. 100, 107-08 (1975), *quoting Memphis Steam Laundry v. Stone*, 342 U.S. 389, 392 (1952); that "[T]his Court usually has deferred to the interpretation placed on a state tax statute by the highest court of its State." *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 629 (1973), *citing Scripto, Inc. v. Carson*, 362 U.S. 207, 210 (1960) and *General Trading Co. v. State Tax Commission of the State of Iowa*, 322 U.S. 335, 337 (1944); that "[T]he application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here." *Scripto, Inc. v. Carson*, 362 U.S. 207, 210 (1960), *citing General Trading Co. v. State Tax Commission of the State of Iowa*, 322 U.S. 335 (1944); that "[W]hen a state court has made its own definite determination as to the operating incidence, our task is simplified. We give the finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *American Oil Co. v. Neill*, 380 U.S. 451, 455-56 (1965); that "ordinarily the construction given to a state statute by the states' highest court capable of deciding the question is taken as binding on this Court." (citations omitted)

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Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, 351 n.20 (1949); that "[W]e are bound by the construction of the statute by the state court." *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 87 n.4 (1948); that "[t]he rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by the state courts." *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs of Montana*, 332 U.S. 495, 499-500 (1947); and that "[s]tate courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so judging, they are the final judicial authority upon the meaning of their state law. It is only in circumstances where their judgments collide with rights secured by the federal constitution that we have power to protect or enforce the federal rights." *Greenough v. Tax Assessors of the City of Newport*, 331 U.S. 486, 497 (1947).

While acknowledging that the Court certainly determines the applicability of constitutional law to constitutional facts, Louisiana asserts that it is the responsibility of Louisiana's state courts to determine the ownership, donative transfer and taxable incidence relative to the catalogs.

Louisiana's Use Tax, As Applied To Holmes, Is Not Violative Of The Commerce Clause

Since the laying of its keel, with rare, but occasional exceptions, in the area of state taxation, the Commerce Clause has been adrift in an uncharted sea with "little in the way of precise guides to the States in the exercise of their indisputable power of taxation," *Northwestern*

States Portland Cement Co. v. State of Minnesota, 358 U.S. 450 (1959), until recently, when the Court began mapping a course for the states to follow in the legislative drafting and judicial application of their tax laws so that they would pass constitutional muster.

Another Louisiana case, *Colonial Pipeline Company v. Traigle*, 421 U.S. 100 (1975), provides as good a starting point as any concerning the Court's recent teachings concerning Commerce Clause challenges to state taxes. The Court grouped together the holdings of past cases in finding as follows:

> It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. Accordingly, decisions of this Court, particularly during recent decades, have sustained nondiscriminatory, properly apportioned state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to a corporation's local activities and the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return. General Motors Corp. v. Washington, 377 U.S. 436 (1964) states the controlling test:
>
> > "[T]he validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the op-

> portunities and protections which the State has afforded. . . . As was said in Wisconsin v. J. C. Penney Co., 311 US 435, 444 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.'"

Id. at 108-09.

A year later the Court in handing down a compensating use tax held:

> Equal treatment of interstate commerce, lacking in § 270-a, has been the common theme running through the cases in which this Court has sustained "compensating," state use taxes. In Henneford v. Silas Mason Co., 300 U.S. 577 (1937), Washington imposed a 2% sales tax on all goods sold at retail in the State. Since the sales tax would have the effect of encouraging residents to purchase at out-of-state stores, Washington also imposed a 2% "compensating tax" on the use of goods within the State. The use tax did not apply, however, when the article had already been subjected to a tax equal to or greater than 2%. The effect of this constitutional tax system was nondiscriminatory treatment of in-state and out-of-state purchases:
>
> > "Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local." Id., at 584.

A similar use-sales-tax structure was sustained in General Trading Co. v. Tax Comm'n, 322 US 335 (1944), because the "tax [was] what it professes to be —a nondiscriminatory excise laid on all personal

> property" regardless of where the sale was made. Id., at 338. See also International Harvester Co. v. Department of Treasury, 322 US 340 (1944); Alaska v. Arctic Maid, 366 US 199, 204 (1961). In all the use-tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences. If he purchased in State, he paid a sales tax; if he purchased out of State but carried the article back for use in State, he paid a use tax of the same amount. The taxes treated both transactions in the same manner.

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 331-32 (1977).

The Court the same year created definitive guidelines to be followed in assessing state taxes when Commerce Clause objections are raised. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Court held: "[W]e now reject the rule of Spector Motor Service, Inc. v. O'Connor, that a state tax on the 'privilege of doing business' is per se unconstitutional when it is applied to interstate commerce, and that case is overruled." *Id.* at 288-89. By its holding that "[W]e note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned" *id.* at 287, the Court adopted a four-prong test for assessing the Commerce Clause validity of a state tax.

Less than a month following its decision in *Complete Auto* the Court decided the case of *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). In *National Geographic* the Court refined the

four-prong test. Regarding the collection of use taxes the important relationship is not that between the state and the specific activity for which the respondent is collecting taxes, but rather the relationship or nexus between the state and the taxpayer's overall activities within the taxing state which allows imposition of the duty to collect taxes:

> The Society argues in other words that there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State. We disagree. However fatal to a direct tax a "showing that particular transactions are dissociated from the local business," Norton Co. v. Illinois Rev. Dept., 340 U.S. 534, 537, Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938), such dissociation does not bar the imposition of the use-tax-collection duty.

Id. at 560.

In this case Louisiana has shown that the use tax as levied on Holmes' catalogs meets each of the four prongs of the test enunciated in *Complete Auto:*

(1) Nexus—Holmes' connection, or nexus, with Louisiana will in four years reach its sesquicentennial mark. (J.A. 57) Holmes has established a preeminent status as a Louisiana based mercantile business, for it owns 13 store locations throughout Louisiana, with 5,000 employees, 500,000 charge customers and 1,000,000 to 1,500,000 other customers. (J.A. 68-69) Holmes' annual sales for the taxable years were: 1979—$159,745,000.00; 1980—$176,548,000.00; and 1981—$197,320,000.00. (J.A. 98) Its income, for the same years before taxes, was: 1979—$6,350,000.00; 1980—$9,061,000.00; and 1981—$8,206,000.00. (J.A. 98)

Holmes distributes its catalogs to each of its 500,000 charge customers, 82% (or 410,000) of which are in Louisiana. (J.A. 89, 80) During the taxable period the number of catalogs distributed was: 1979—four; 1980—six; and 1981—nine. (J.A. 80) Thus, with 410,000 charge customers being given nineteen catalogs in these three years, the total distribution by Holmes would be 7,790,000 catalogs within Louisiana.

Holmes should not be given a home-town advantage of a dweller within and at the same time expect the benefits of a stranger from afar. As the Court held in *Norton Company v. Department of Revenue of the State of Illinois*, 340 U.S. 534 (1951):

> Petitioner elected to localize itself in the Illinois market with the advantages of a retail outlet in the State, to keep close to the trade, to supply locally many items and take orders for others, and to reduce freight costs to local consumers. Although the concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business.

Id. at 538-39 (Citation omitted); *see also General Motors Corporation v. Washington*, 377 U.S. 436, 440-41 (1964) (drawing distinction between taxation based upon the activities of non-domiciliary taxpayers as compared to domiciliary taxpayers (such as Holmes)).

The nexus present here is much more substantial than that present in other cases in which this Court has upheld a state tax as valid under the Commerce Clause. In *Na-*

tional Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977), National Geographic had only two offices in California, both of which solicited advertising copy for a monthly magazine. Neither office performed any activities related to a mail-order business also conducted by National Geographic. Nonetheless, National Geographic was required to collect use tax. Last term this Court held that solicitation by an independent contractor constitued "a sufficient nexus" to levy taxation. *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. —, 97 L Ed 2d 199, 215, 107 S.Ct. 2810 (1987). The Court cited approvingly the statement of the Washington Supreme Court that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Id.* at 215-16. Here the Sales Promotion Manager of Holmes testified that the catalogs are "[p]rinted for a purpose of attempting to secure business," and that they do in fact secure business for Holmes. (J.A. 71) Catalogs also help to keep Holmes' name in front of the public. (J.A. 72) He further testified:

> Q: In other words, the catalog is used for more than catalog sales, it's to encourage people to use D.H. Holmes?
>
> A: Yes.
>
> (J.A. 73)

(2) There is no discrimination as to interstate commerce, for the sales tax payable on the purchase of tangible personal property is equal to the use tax applicable to the

same tangible personal property. R.S. 47:302 A, 321 A. As the Court held in *International Harvester Company v. Department of Treasury of the State of Indiana*, 322 U.S. 340 (1944):

> We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such "local activities or privileges" are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage.

Id. at 349 (citations omitted).

(3) The tax is fairly apportioned for no sales tax was paid where the catalogs were designed and printed. (J.A. 69, 85, 86) Had such a sales tax been paid Louisiana would have granted a credit against the use tax for the sales tax paid elsewhere. R.S. 47:301 A(2), 303 A and 321 A(2).

(4) The services provided by Louisiana in relation to the tax were not at issue, for Holmes has admitted the substantiality of the services. (J.A. 42, 51. Holmes' brief page 26) Substantiality of the services is also reflected in the testimony as reproduced at J.A. 41-52. Plaintiff's Exhibit No. 1 reproduced at J.A. 20-34, Admitted, T. R. 52.

Holmes argues that this four-prong test does not apply because this Court has not applied the test where the question involves a direct tax on goods while still in the course of interstate commerce. Of course, the courts below found that the incidence of the tax occurred after the interstate journey was at an end. Determination of the operating incidence is a state law question. *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 107-08 (1975), *quoting Memphis Steam Laundry v. Stone,* 342 U.S. 389, 392 (1952).

Holmes' argument is nothing more than an attempt to convince this Court to again rely on formalistic labels and turn its back on its expressed goal of "establish[ing] a consistent and rational method of inquiry focusing on 'the practical effect of a challenged tax.'" *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 615 (1981), *quoting Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 443 (1980). Since its formulation in *Complete Auto Transit,* the four-prong test has been used to determine the validity of business and occupational taxes, *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978); taxation of income received by a corporation from its subsidiaries, *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 443 (1980); use taxes, *Maryland v. Louisiana,* 451 U.S. 725, 754 (1981); severance taxes, *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 617 (1981); highway taxes, *American Trucking Associates v. Scheiner,* 483

U.S. —, 97 L Ed 2d 226, 250, 107 S. Ct. 2829 (1987); and sales taxes, *Wardair Canada, Inc. v. Florida Department of Revenue,* 477 U.S. 1, —, 91 L Ed 2d 1, 10, 106 S. Ct. 2369 (1986). Although invalidating an ad valorem tax as applied to foreign commerce in *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), the Court commented that "[w]e may assume that, if the containers at issue here were instrumentalities of purely interstate commerce, *Complete Auto* would apply and be satisfied, and our Commerce Clause inquiry would be at an end." *Id.* at 446. Certainly, the four-prong test found applicable in every other state tax case since *Complete Auto* also governs determination of this use tax case.

Due Process Claim

American Retail Foundation and Direct Marketing Association have each in their amicus curiae briefs attempted to bootstrap an additional constitutional issue, Due Process. Such a claim has not heretofore been before the courts in this case. Space limitations preclude a comprehensive reply to their arguments. Without conceding its applicability in this case, as a precautionary measure only, Louisiana has shown the Due Process Clause as being one of the Constitutional Statutory and Regulatory Provisions and if argument is deemed necessary, or appropriate, Louisiana relies on Louisiana's Commerce Clause arguments. The Court has noted the close relationship between the Due Process Clause of the Fourteenth Amendment and the Commerce Clause. *See National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois,* 386 U.S. 753 at 756 (1967); *see also Exxon Corp. v. Wisconsin Dept. of Revenue,* 447 U.S. 207, at 226-28 (1980); *see also*

Asarco, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 350 (1982) ("Our cases establish that analysis of the validity of state taxation under the Commerce Clause is similar to analysis under the Due Process Clause." (O'Connor, J., dissenting))

———o———

CONCLUSION

In fine, Holmes distributes catalogs to its customers to encourage the sale of its articles of merchandise. Holmes may, by choice, either arrange for the printing of these catalogs in the State of Louisiana in which event Holmes pays the applicable sales tax due to the State of Louisiana, or arrange for the printing of these catalogs in states other than Louisiana in which event a sales tax would be due and payable to the taxing jurisdiction where printed. If the sales tax in that jurisdiction is less than the sales tax would have been had the printing occurred in Louisiana, then Holmes would be liable to Louisiana for the difference as a compensating use tax. If Holmes has the catalogs sent direct to Holmes' stores, as it did with the 1,000 catalogs, and then distributed the catalogs from these stores, then, as the owner of the catalogs with "possession," Holmes pays to Louisiana the compensating use tax on these catalogs. This is because Holmes is a dealer who imports, or causes to be imported, these catalogs for distribution. R.S. 47:301, 302 A(2), 303 A and 321 A(2). Holmes, by choice, wants to be sure that these same catalogs are distributed to Holmes' customers timely in connection with Holmes' purpose for having the catalogs printed, instead of hoping that all of its 500,000

charge customers will timely pick up the catalogs in the stores. Therefore, Holmes uses the United States Mail as a conduit for the pre-sale timely delivery of the catalogs. Holmes can mail them from its Louisiana stores or mail them from the printing situs. The manner of the catalog's distribution would be the same. Holmes, however, says, but no, if we don't touch the catalogs, we don't possess them, and we don't have to pay a tax on the catalogs.

The trial court put its finger on the matter:

> THE COURT: The other thing is, does D.H. Holmes have a right to or any of the department stores, have a right to circumvent the laws of the State by having its catalogs printed out of state and shipped from out of state? Would a person, if they decided that they were going to let Edward Printing Company, which is a local printing company, do their catalogs and mail them, would that be subject to tax?
>
> MR. RINKER: Yes, it would, your Honor, there's no question. As a matter of fact, the cases that we cited discussed the distinction between those two possibilities saying that if you print them in the State you pay the taxes and if you buy them from out of state, you don't pay the taxes.
>
> THE COURT: So, you're saying then in effect, in answer to my other question, that Holmes has control over whether taxes are due on certain items and not the legislature of the State of Louisiana?
>
> MR. RINKER: To some extent, that's correct.

(J.A. 97)

Whether the catalogs were printed for Holmes by a Louisiana printer, such as Edward Printing Company, or an out-of-state printer, the product is the same—a catalog;

Holmes' objective in having the catalogs printed is the same—distribution to its charge customers;

The timeliness with which Holmes desires to have the catalogs delivered is the same, regardless of the point of origin whether within or without Louisiana—by the United States Mail;

If the catalogs are destroyed in the mail, the remedy is the same—a claim for damages;

If the catalogs are misprinted the solution is the same—their recall from the postal service;

And, most importantly, the intended recipient is the same—the Louisiana resident.

As Justice Cardozo stated in the "granddaddy" of use tax cases, "The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937).

The judgment of the Court of Appeals should be affirmed.

All the above and foregoing is thus respectfully submitted.

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February 8th, 1988

APPENDIX

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution

Article 1, Section 8, clause 3

["Commerce Clause"]

The Congress shall have the power . . .

3. To regulate Commerce . . . among the several states, . . .

Fourteenth Amendment, Section 1, clause 3

["Due Process Clause"]

• • • • nor shall any State deprive any person of life, liberty, or property, without due process of law; • • • •

Louisiana Revised Statutes

R.S. 47:301 Definitions

(4) "Dealer" is further defined to mean:

(a) every person, who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

(19) "Use tax" includes the use, the consumption, the distribution and the storage, as herein defined.

R.S. 47:302 Imposition of tax

A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of

each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

R.S. 47:303 Collection

A. *Collection from dealer.* The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

On all tangible personal property imported, or caused to be imported, from other states or foreign countries, and used by him, the "dealer," as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

A credit against the use tax imposed by this Chapter shall be granted to taxpayers who have paid a similar tax upon the sale or use of the same tangible

personal property in another state. The credit provided herein shall be granted only in the case where the state to which a similar tax has been paid grants a similar credit as provided herein, provided that members of the armed forces who are citizens of this state and whose orders or enlistment contracts stipulate a period of active duty of two years or more and who purchase automobiles outside of the state of Louisiana while on such tour of active duty shall be granted such credit in connection with the purchase of such automobiles whether or not the state to which such tax thereon has been paid grants a similar credit as herein provided. The proof of payment of a similar tax to another state shall be made according to rules and regulations promulgated by the collector of revenue. In no event shall the credit be greater than the tax imposed by Louisiana upon the particular tangible personal property which is the subject of the Louisiana use tax.

R.S. 47:321 Imposition of (additional sales) tax

A. In addition to the tax levied by R.S. 47:302(A) provisions of Chapter 2 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, . . . the levy of said tax to be as follows:

(1) At the rate of one percent of the sales price of each item or article of tangible personal property when sold at retail in this state, the tax to be computed on gross sales for the purpose of remitting the amount of tax to the state, and to include each and every retail sale.

(2) At the rate of one percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this

state, provided that there shall be no duplication of the tax.

Louisiana Civil Code

L.C.C. Art. 481[1] Ownership and possession distinguished

The ownership and the possession of a thing are distinct.

Ownership exists independently of any exercise of it and may not be lost by nonuse. Ownership is lost when acquisitive prescription accrues in favor of an adverse possessor.

COMMENTS

The Comments relating to Article 481 state:

(a) This provision reproduces the substance of Article 496 of the Louisiana Civil Code of 1870. It does not change the law.

(b) There are no corresponding provisions in modern civil codes or in the French Civil Code. Article

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[1] During one of the taxable years at issue, 1979, this Article was numbered 496 and read:

The right of ownership exists independently of the exercise of it. The owner is not less the owner because he performs no act of ownership, or because he is disabled from performing any such act, or even because another performs such acts without the knowledge or against the will of the owner.

But the owner exposes himself to the loss of his right of ownership in a thing if he permits it to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription.

Titles I, II and III of Book II of the Louisiana Civil Code were extensively revised by the 1976, 1978 and 1979 Legislatures. These revisions, which encompass C.C. arts. 448 to 645 and replace former C.C. arts 448 to 645 of the Civil Code of 1870, were made on recommendation of the Louisiana State Law Institute.

496 of the Louisiana Civil Code of 1870 derives from the 1825 revision. The redactors observed: "The principle developed in this article is necessary in order to show that the right of ownership can be preserved without the exercise of any act of ownership, and without any actual possession on the part of the owner. Digest Book 41, title 2, law 22, Sec. 1, and Toullier, lois civiles, vol. 3, No. 82, p. 68." 1 Louisiana Legal Archives, Projet of the Louisiana Civil Code of 1825, p. 44 (1937).

L.C.C. Art. 1467 Methods of acquiring or disposing gratuitously

Property can neither be acquired nor disposed of gratuitously, unless by donations *inter vivos* or *mortis causa,* made in the forms hereafter established.

L.C.C. Art. 1468 Donation inter vivos, definition

A donation *inter vivos* (between living persons) is an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it.

L.C.C. Art. 1540 Donations effective from date of acceptance

A donation *inter vivos* shall be binding on the donor, and shall produce effect only from the day of its being accepted in precise terms.

The acceptance may be made during the lifetime of the donor by a posterior and authentic act, but in that case the donation shall have the effect, with regard to the donor, only from the day of his being notified of the act establishing that acceptance.

L.C.C. Art. 1543 Acceptance during life of donee

The acceptance can only be made by the donee personally, or by his attorney in fact during his life. If he refuse or neglect to accept, his creditors can not accept it in his stead, under the pretext that the refusal has been in fraud of their rights.

Code of Federal Regulations

39 C.F.R. § 111—General Information on Postal Services

§ 111.1 Domestic Mail Manual; incorporation by reference of regulations governing domestic mail services.

Section 552(a) of Title 5, U.S.C., relating to the public information requirements of the Administrative Procedure Act, provides in pertinent part that "* * * matter reasonably available to the class of persons affected thereby is deemed published in the FEDERAL REGISTER when incorporated by reference therein with the approval of the Director of the Federal Register." In conformity with that provision, and with 39 U.S.C. section 410(b)(1), and as provided in this part, the U.S. Postal Service hereby incorporates by reference in this part, the Domestic Mail Manual, a looseleaf publication published and maintained by the U.S. Postal Service, Washington, D.C. 202[illegible].

Domestic Mail Manual

152 Mail Deposit and Collection

152.7 Recall of Mail

.71 Who May Recall Mail. Mail deposited in a collection box or post office may be recalled on proper identification by the sender, by the parent or guardian of a minor child, or by the guardian of a person of unsound mind who sent the mail. Form 1509. *Sender's Application for Recall of Mail,* which may be obtained at any post office, must be submitted to the postmaster at the office of mailing. After processing, these applications and all related papers must be filed at the office of mailing.

39 C.F.R. § 281 Firm Mailings Damaged or Destroyed Through Transportation Accidents or Catastrophes

§ 281.1 Notification of firm mailers.

Whenever bulk firm mail shipments are involved in transportation accidents or catastrophes, such as train or highway accidents, fire, flood, etc., it will be the responsibility of the sectional center director of customer services at the office of mailing to give known mailers timely notification of the incident and its effect on their mail shipment(s).

39 C.F.R. § 912 Procedures to Adjudicate Claims for Personal Injury or Property Damage Arising Out of the Operation of the U.S. Postal Service

§ 912.5 Administrative claim; when presented

(a) For purposes of this part, a claim shall be deemed to have been presented when the U.S. Postal Service received from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95, Claim for Damage or Injury, or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident. Standard Form 95 may be obtained from postmaster, postal inspectors, or other local Postal Service establishments.

§ 912.6 Administrative claim; who may file

(a) A claim for injury to or loss of property may be presented by the owner of the property, his duly authorized agent, or legal representative.

* * *

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.